BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

STEVEN GREGG VASSALLI	)	
Claimant	)	
VS.	)	
	)	Docket No. 267,683
CITY OF WICHITA	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant appeals the July 15, 2002 Award of Administrative Law Judge John D. Clark. Claimant's award was limited to a 9 percent permanent partial disability to the body as a whole on a functional basis after the Administrative Law Judge ruled claimant's termination by respondent was due to restrictions and limitations placed upon him as a result of a back injury suffered in Docket No. 262,962. The Appeals Board (Board) held oral argument on January 17, 2003.

APPEARANCES

Claimant appeared by his attorney, Gary K. Jones of Wichita, Kansas. Respondent appeared by its attorney, Edward D. Health, Jr., of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

(1) What is the nature and extent of claimant's injury and disability?

(2) If claimant is entitled to a work disability under K.S.A. 44-510e, is respondent entitled to a credit from the prior award based upon K.S.A. 44-510a?

Claimant contends he is entitled to a work disability for the bilateral carpal tunnel syndrome condition suffered through his last date of employment with respondent,

June 20, 2001. Respondent contends the Award of the Administrative Law Judge should be affirmed, as claimant was awarded $100,000 for the injuries suffered to his back.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds as follows:

Claimant began working for respondent in 1982. By 1986, claimant was promoted to Equipment Operator I, which is the job he was performing at the time of his injury. Claimant's duties required he mow grass for eight months of the year, with one month of the year involving mulching of leaves and various other duties on the tractor. In the wintertime, claimant would clean off snow, trim trees, clean up trash and perform other odd jobs.

Sometime prior to March 6, 2001, claimant's hands began falling asleep. Claimant had been treated for diabetes for several years with Dr. Heartstone, and there was initially some question regarding whether claimant's hand problems were associated with the diabetes. Dr. Heartstone referred claimant to a neurologist, Dr. Olmstead, who, after performing tests, determined that claimant's hand problems were not related to his diabetes, but instead were related to bilateral carpal tunnel syndrome.

Claimant was referred to Frederick R. Smith, D.O., at Wesley Medical Center Occupational Health Services on March 28, 2001. Claimant was placed on restrictions, which included no lifting and no running of vibratory equipment. Dr. Smith further restricted claimant from forceful or repetitive movements and prescribed wrist splints. Claimant was also referred to physical therapy.

Claimant had suffered a back injury while working for respondent prior to the development of the bilateral upper extremity hand problems. This back injury occurred over a period of time beginning May 24, 2000, and ending July 3, 2000. As a result of that back injury, claimant was awarded a permanent partial general disability of 62.5 percent, which, based upon an average weekly wage of $595.80, computed to a $100,000 award. This January 24, 2002 Nunc Pro Tunc Award of Judge Clark was appealed to the Board and affirmed in the Board's Order of August 29, 2002.

Claimant's last day worked for respondent was June 20, 2001. He had been provided a termination letter from respondent, which, in its contents, referenced an FCE and restrictions from Dr. Smith relative to claimant's back injury. The record is uncontradicted that claimant's termination of employment related to the back injury, rather than to claimant's bilateral carpal tunnel syndrome. After claimant's termination, he continued receiving treatment for his hand problems.

On May 17, 2001, claimant was referred to orthopedic surgeon and hand specialist J. Mark Melhorn, M.D. Dr. Melhorn first examined claimant on May 17, 2001, diagnosing bilateral carpal tunnel syndrome. Claimant underwent conservative care, which failed to improve his condition. Claimant then elected to undergo surgery on June 21, 2001, for a left carpal tunnel release, and on July 5, 2001, for a right carpal tunnel release.

Dr. Melhorn assessed claimant a 5.3 percent impairment at the level of the forearms, which, when combined under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.), equated to a 6 percent whole body functional impairment for the bilateral carpal tunnel syndrome. Dr. Melhorn was provided a task analysis prepared by Jerry Hardin. After reviewing the documents, Dr. Melhorn opined claimant would be able to perform all the tasks in documents A, B and C, although he did express concern about the task "drove tractor with mower/snow blade/edger" under document A. Claimant would only be able to perform that job if he was allowed task rotation. Of the total of twelve tasks, Dr. Melhorn, therefore, felt claimant incapable of performing one, for a task loss of 8.33 percent.

On cross-examination, it was noted that there were five additional tasks which Dr. Melhorn felt claimant could only do if task rotation were permitted. There were also additional tasks he was unable to testify to because he did not have enough information. A final analysis of Dr. Melhorn's testimony displays an inability by claimant to perform six of the twelve tasks listed, for a 50 percent task loss.

Claimant was referred to Pedro A. Murati, M.D., board certified in rehabilitation and physical medicine and a certified independent medical examiner. This examination, performed September 24, 2001, at the request of claimant's attorney, resulted in a diagnosis of bilateral carpal tunnel syndrome, for which Dr. Murati assessed claimant a 10 percent impairment to each upper extremity, which converts to a 6 percent whole person impairment. When combined under the AMA *Guides* (4th ed.), this computes to a 12 percent whole person impairment. Dr. Murati restricted claimant from heavy grasping at any time and limited his lifting, carrying, pushing and pulling to 35 pounds. He would allow only occasional repetitive grasping and gripping and frequent use of hand controls. He further restricted claimant from using hooks or knives or vibratory tools at any time.

In reviewing the task analysis of Mr. Hardin, Dr. Murati ultimately determined claimant incapable of performing four of twelve tasks, for a 33.33 percent task loss.

As noted above, claimant was terminated by respondent, with his last day worked being June 20, 2001.

By the time of the regular hearing, claimant had applied for numerous jobs and had been receiving unemployment for approximately thirteen weeks. Claimant is also taking computer classes through the City of Wichita.

Claimant testified regarding a business he runs. This business involves selling automotive chemical products, which he has been doing since March of 1999. Claimant has earned no profit from this business for the years 1999, 2000 or 2001.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[1]

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[2]

Claimant was assessed a 6 percent whole person impairment from Dr. Melhorn and a 12 percent whole person impairment by Dr. Murati. The Administrative Law Judge found the opinions of each doctor should be given equal weight, assessing claimant a 9 percent impairment of function to the body as a whole. The Board concurs with that finding and adopts it as its own.

K.S.A. 44-510e(a) defines the extent of permanent partial general disability as:

> [T]he extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

Both Dr. Murati and Dr. Melhorn testified as to the task loss percentage suffered by claimant. Dr. Murati found claimant incapable of performing four of the twelve tasks listed by Mr. Hardin in his report, with Dr. Melhorn finding claimant incapable of performing six of twelve. The Board finds no justification for placing greater emphasis on the opinion of one doctor over the other and, in considering both, finds claimant has suffered a 42 percent task loss as a result of his bilateral carpal tunnel syndrome.

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[1] K.S.A. 44-501 and K.S.A. 44-508(g); *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

[2] K.S.A. 44-510e(a).

K.S.A. 44-510e obligates the trier of fact to average claimant's task loss percentage with the difference between claimant's average weekly wage which claimant was earning at the time of the injury and the average weekly wage claimant is earning after the injury. With regard to claimant's permanent disability, the Board must first consider the policies set forth by the Kansas Court of Appeals in *Foulk*[3] and *Copeland*.[4] In *Foulk*, the Kansas Court of Appeals held that the Workers Compensation Act should not be construed to award benefits to a worker solely for refusing a proffered job the worker has the ability to perform. In this instance, claimant was terminated by respondent as a result of injuries suffered to his low back in his earlier workers' compensation case. There was no offered job by respondent, and the policies of *Foulk* would not apply.

In *Copeland*, the Court of Appeals stated that if a claimant fails to make a good faith effort to obtain post-injury employment, then the trier of fact is obligated to impute a wage based upon the evidence in the record as to the claimant's wage-earning ability. In this instance, claimant has testified, and the evidence supports claimant's contention, that he is putting forth a good faith effort to find a job. Claimant has made numerous attempts at locating jobs, was receiving unemployment and satisfying the requirements of unemployment at the time of regular hearing and had enrolled in a computer class, which was offered through the City of Wichita, in order to improve his marketability. The Board finds claimant's actions display a good faith attempt on claimant's part to find post-injury employment. Therefore, under K.S.A. 44-510e, claimant's wage loss would be 100 percent.

In combining claimant's task loss and claimant's wage loss, the Board finds claimant has suffered a work disability of 71 percent to the body as a whole.

Respondent contends it is entitled to a credit under K.S.A. 44-510a, as claimant is receiving an award for the injuries suffered to his low back in Docket No. 262,962. K.S.A. 44-510a states, in part:

> (a) If an employee has received compensation or if compensation is collectible under the laws of this state or any other state or under any federal law which provides compensation for personal injury by accident arising out of and in the course of employment as provided in the workers compensation act, and suffers a later injury, compensation payable for any permanent total or partial disability for such later injury shall be reduced, as provided in subsection (b) of this section, by the percentage of contribution that the prior disability contributes to the overall

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[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

> disability following the later injury. The reduction shall be made only if the resulting permanent total or partial disability was contributed to by a prior disability and if compensation was actually paid or is collectible for such prior disability. Any reduction shall be limited to those weeks for which compensation was paid or is collectible for such prior disability and which are subsequent to the date of the later injury. The reduction shall terminate on the date the compensation for the prior disability terminates or, if such compensation was settled by lump-sum award, would have terminated if paid weekly under such award and compensation for any week due after this date shall be paid at the unreduced rate. Such reduction shall not apply to temporary total disability, nor shall it apply to compensation for medical treatment.
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> (b) The percentage of contribution that the prior disability contributes to the later disability shall be applied to the money rate actually collected or collectible for the prior injury and the amount so determined shall be deducted from the money rate awarded for the later injury. This reduced amount of compensation shall be the total amount payable during the period of time provided in subsection (a), unless the disability award is increased under the provisions of K.S.A. 44-528 and amendments thereto.

In looking at the two disability awards, the Board finds that the prior disability to claimant's back, which has directly contributed to claimant's unemployment, does contribute to the overall work disability currently suffered by claimant. In considering the amount of contribution, the Board finds the prior disability contributed 100 percent to the current work disability for the overlapping periods in question.

Claimant's prior award occurred as a result of injuries suffered through July 3, 2000. Under K.S.A. 44-510a, there would be no credit for any period of time which preceded claimant's current injury. Claimant's current injury occurred through his last day worked, June 20, 2001. The period July 4, 2000, through June 20, 2001, constitutes 50.29 weeks compensation, during which there would be no offset from the prior award. Effective June 21, 2001, respondent would be entitled to an offset under K.S.A. 44-510a.

The prior award total payout involved 256.74 weeks of benefits. Deducting the 50.29 weeks of benefits, during which no offset would be allowed, leaves 206.45 weeks of overlapping benefits during which time a K.S.A. 510a credit would be appropriate.

In the current award, claimant is entitled to a 71 percent permanent partial general disability which, when computed, equates to 302.54 weeks. However, when applying the maximum liability limitations of K.S.A. 44-510f of $100,000, this reduces to 251.75 weeks of benefits at the appropriate rate of $397.22 per week based upon claimant's stipulated average weekly wage of $595.80.

The parties acknowledge no temporary total disability compensation was payable or claimed in this matter. Therefore, there would be no limitation to the K.S.A. 510a credit offset for temporary total disability compensation.

In deducting the 206.45 weeks of overlapping benefits from the total weekly payment of 251.75 weeks, the Board finds claimant entitled to an additional 45.30 weeks of benefits at the rate of $397.22 per week in the amount of $17,994.97 after the K.S.A. 44-510a credit is applied.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated July 15, 2002, should be, and is hereby, modified to award claimant a functional impairment of 9 percent to the body as a whole for the injuries suffered through June 20, 2001, followed thereafter by a permanent partial general disability of 71 percent. This equates to a payment of 251.75 weeks at the rate of $397.22 per week in the amount of $100,000.

Respondent is awarded a credit under K.S.A. 44-510a for 206.45 weeks of permanent partial general disability at the rate of $397.22 per week beginning June 21, 2001, and continuing for 206.45 weeks. Thereafter, claimant is awarded an additional 45.30 weeks permanent partial general disability compensation at the rate of $397.22 per week totaling $17,994.07.

Claimant's current payments will continue subject to the offset for 206.45 weeks which would be through June 4, 2005. Effective June 5, 2005, the remaining 45.30 weeks will be paid at the rate of $397.22 per week until fully paid or until further order of the Director.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this ____ day of May 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary K. Jones, Attorney for Claimant
Edward D. Heath, Jr., Attorney for Respondent
John D. Clark, Administrative Law Judge
Director, Division of Workers Compensation